

**Brisco Sheet Metal, Inc. and Sheet Metal Workers'
International Association, Local Union No. 104.**
Case 20-CA-23372

April 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On October 23, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We agree with the judge that the Union is entitled to the requested information concerning the relationship between the Respondent and American Eagle Fireplace Co. regardless of whether the Respondent is bound to the current collective-bargaining agreement. We reject the Respondent's contention that the Union, in its letter of March 15, 1990, limited its request for information to that required to enforce its collective-bargaining agreement. The letter accompanying the questionnaire read in pertinent part, "Local 104 must determine the necessity for grieving any violations of the Labor Agreements. Local 104 must also determine whether the issue of non-unions should be addressed elsewhere"²

¹ As requested by the General Counsel in his exceptions, we correct the second sentence of sec. III,A,3 ("Pertinent Facts") of the judge's decision to state that the Respondent was established in 1980 rather than in 1990.

The General Counsel excepts to the judge's finding that the information which the Respondent refused to furnish deals only with individuals outside the bargaining unit. We agree that the judge's observation in the first sentence of par. 4, sec. III,B,1 of his decision is overbroad. In adopting the decision, we find simply that, insofar as the requested information which the Respondent has refused to furnish to the Union in the present case deals with individuals outside the bargaining unit, the General Counsel has the burden of demonstrating the information's relevance.

The General Counsel excepts to the wording of the judge's notice, contending that its reference to the "questionnaire published in Appendix 1 to this decision" is confusing. We have substituted a new notice.

² We find no merit in the Respondent's argument that the Union withdrew its request for information by its March 29, 1990 letter stating that it had no problem delaying the processing of grievances. The letter did not state that the request for information was being withdrawn. Further, on May 14, 1990, the Union filed its 8(a)(5) charge alleging as unlawful the Respondent's refusal to furnish information, effectively eliminating any possible ambiguity in the Union's March 29, 1990 letter.

We find that the Union, the certified representative of Brisco Sheet Metal, Inc.'s employees as of September 8, 1989, had a reasonable basis for believing that the Respondent was either diverting bargaining unit work to American Eagle Fireplace Co., or that American Eagle Fireplace Co. was in fact a possible alter ego. The Union was entitled to the requested information to determine the nature of the relationship between the companies and to determine whether the Respondent was committing unfair labor practices by unilaterally changing the terms and conditions of employment of its unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brisco Sheet Metal, Inc., Cotati, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order except that the attached notice is substituted for that of the administrative law judge.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues that the Union is entitled to the requested information regardless of whether the Respondent is bound by the current collective-bargaining agreement. I also agree that the Union did not limit its request for information to that necessary to enforce the collective-bargaining agreement to which it claimed the Respondent was bound and that the Union did not withdraw its request for information.

In concluding that the Union is entitled to the requested information, however, I rely on the fact that the Union, the certified collective-bargaining representative of Brisco Sheet Metal, Inc.'s employees, had a reasonable objective basis for believing either that American Eagle Fireplace Co. might be an alter ego of Brisco Sheet Metal, Inc., or that the two might be a single employer with operations that properly comprised a single bargaining unit. Having established this reasonable objective basis, the Union is entitled to the information necessary to establish whether its suppositions are true. *Maben Energy Corp.*, 295 NLRB 149 (1989).¹ If in fact there is an alter ego relationship, the Union then also represents employees of American Eagle Fireplace Co. See *Ray C. Lapp Air Conditioning*, 270 NLRB 641 (1984); *Leonard B. Hebert, Jr., & Co.*, 259 NLRB 881, 884-885 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983), cert. denied 464 U.S. 817 (1983); *Associated General Contractors of California*, 242 NLRB 891 fn. 5 (1979), enfd. as modified 633

¹ A reasonable basis for believing only that American Eagle Fireplace had the same owners as Brisco and performed work of the same type would not suffice to make information about the American Eagle employees relevant to the Union's performance of its collective-bargaining responsibilities. See, e.g., *United Constructors*, 233 NLRB 904, 912-913 (1977).

F.2d 766 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981). Furthermore, if the work performed by the American Eagle employees is truly work that belongs within the same bargaining unit,² the Union also—as the judge observed—has a duty to pursue the question of diverted bargaining unit work on behalf of the Brisco employees, if only in any future negotiations for a contract in that certified unit. I therefore find that the requested information is relevant and necessary to the Union's performance of its duties as a collective-bargaining representative of the Brisco employees and possibly as a representative of the American Eagle Fireplace employees.

APPENDIX II

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Sheet Metal Workers' International Association, Local Union No. 104 by refusing to supply it with answers to the Union's March 15, 1990 questionnaire regarding the possible relationship of our Company to American Eagle Fireplace Co.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, furnish to it the answers to the Union's March 15, 1990 questionnaire regarding the possible relationship of our Company to American Eagle Fireplace Co.

BRISCO SHEET METAL, INC.

²The Union would thereby be seeking work preservation, as opposed to work acquisition.

Paula R. Katz, Esq. and *Sherri Hayes Sawyer, Esq.*, for the General Counsel.

Mark D. Jordan, Esq. (Jordan & Ferrington), of Santa Rosa, California, for the Respondent.

Kathryn A. Sure, Esq. (Wylie, McBride, Jesinger & Sure), of San Jose, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Santa Rosa, California, on April 23, 1991,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 20 on June 28, and which is based upon a charge filed by Sheet Metal Workers' International Association, Local Union No. 104 (the Union) on May 16. The complaint alleges that Brisco Sheet Metal, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issue

Whether Respondent has unlawfully failed and refused to furnish the Union with certain information requested in a 14-page questionnaire which is alleged to be necessary for and relevant to, the Union's performance of its function as the exclusive bargaining representative of the unit.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the residential and commercial sheet metal contracting business with an office and place of business located in Cotati, California. Respondent further admits that during the calendar year ending December 31, 1989, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of \$500,000. It further admits that during the calendar year ending December 31, 1989, in the course and conduct of its business, Respondent has purchased and received at its California facility products, goods, and materials valued in excess of \$5000 which originated from points outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Sheet Metal Workers' International Union, Local Union No. 104 is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates herein refer to 1990 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

1. Procedural matters

When the hearing ended on April 23, 1991, I allowed the record to remain open so the parties could move to admit certain additional exhibits into evidence at a later time. Pursuant to that arrangement, the General Counsel has submitted two separate motions for submission of late exhibits which I herewith grant. The first, dated June 21, 1991, moves into evidence General Counsel's Exhibit 5(e), Union's Memorandum of Points and Authorities in Opposition to Motion for Reconsideration, dated May 8, 1991, and Union's Exhibit 1, Union's letter, dated April 10, 1991, drafted in response to Respondent's Exhibit 12. The General Counsel's second motion, dated August 27, 1991, moves into evidence General Counsel's Exhibit 4(a), a collective-bargaining agreement, also called Standard Form Union Agreement (SFUA Form A-3-89) and addenda, between Employer's Association Redwood Empire Sheet Metal and Air Conditioning Contractors' Association, Inc. (SMACNA), and the Charging Party, effective between July 1, 1989, and June 30, 1992, and General Counsel's Exhibit 5(f), an order of U.S. District Judge D. Lowell Jensen, dated May 29, 1991.²

Respondent, too, has submitted a motion for submission of late exhibit which I herewith grant. This motion, dated June 28, 1991, moves into evidence as Respondent's Exhibit 20³ the Union's notice of appeal, dated June 19, 1991, from Judge Jensen's order (G.C. Exh. 5(f)).

I now formally close the record of this proceeding and turn to the facts and circumstances surrounding this case.

2. Background

As the late exhibits indicate, the Union and Respondent are engaged in collateral litigation in the Federal courts. Currently, the litigation has moved from the district court to the court of appeals. In this litigation, the Union is attempting to enforce a prior arbitration award against Respondent (G.C. Ex. 5(c)).⁴ A central issue concerns the question whether Respondent is bound to SFUA, Form A-3-89 (G.C. Exh. 4(a)) and if so, what the proper scope of SFUA, Form A-3-89 is. In its initial order of March 20, 1991 (G.C. Exhs. 5(a), (b)), the court ruled in favor of petitioner Union. Respondent then filed a motion for reconsideration (G.C. Exh. 5(d)). The Union filed its memorandum of points and authorities in opposition (G.C. Exh. 5(e)). On May 28, 1991, Judge Jensen granted in part, Respondent's motion for reconsideration (G.C. Exh. 5(f)). Currently, the Union is appealing from the court's May 28 order (R. Exh. 20). In order to decide the

issue presented in the instant case, it will not be necessary to decide whether Respondent is bound to SFUA, Form A-3-89, nor whether Respondent is or was a member of SMACNA, and if so, whether any purported withdrawal from SMACNA was untimely under Board law. Instead, there is an alternative method of analyzing this case, to be detailed below in the analysis and conclusion section of this decision, which will yield a proper decision on the narrow issue presented.

3. Pertinent facts

Respondent witness David Brisco is president, general manager, and co-owner of Respondent with his wife Letitia. Begun in January 1980 as a sole proprietorship, Respondent was incorporated in 1983. Brisco testified that in 1981, he personally negotiated with a representative of the Union, the first in a series of collective-bargaining agreements (R. Exh. 1). Other agreements followed, for the most part, at 3-year intervals (R. Exh. 2). Although Brisco testified he was not a member of SMACNA, he generally adopted their agreements negotiated with the Union. For the period of 1986 through 1989, this same pattern prevailed and all parties agree that Respondent was bound to a collective-bargaining agreement which expired on June 30, 1989, SFUA (Form A-3-86) (G.C. Exhs. 3(a), (b), and (c); R. Exh. 10). Unlike past agreements where Brisco represented himself in negotiations with union representatives, this labor agreement was negotiated by Respondent's attorney, Mark Jordan. Again Brisco testified he was not, as of the date Jordan signed this agreement, a member of SMACNA.

On March 27, 1989, Attorney Jordan sent the first of three letters to the Union and/or union counsel which deserve recitation in this decision. The letters, read as follows:

March 27, 1989

Sheet Metal Workers International
Association, Local Union #104
1939 Market Street
San Francisco, CA 94103

Re: Brisco Sheet Metal, Rohnert Park, California

Dear Sir:

Please be advised that the above-referenced employer is represented by our firm in all manners pertaining to labor relations.

Please accept this letter as notice pursuant to Item 41, Termination and Item Renegotiations of the most recent Collective Bargaining Agreement that it is the intention of the above-referenced employer that its Collective Bargaining Agreement end June 30, 1989.

Be further assured that this employer will discharge any collective bargaining obligation which may be required of it by any Federal statute, or rules and regulations. Any such bargaining will be discharged by the individual employer as a single employer not part of any multi-employer group. By copy of this letter to the Redwood Empire Chapter, Sheet Metal and Air Conditioning Contractors National Association, the individual employer is hereby withdrawing any authorization that Chapter may have had to represent it in any negotiations.

² Apparently through inadvertence, the General Counsel assigned G.C. Exh. 5(f) both to Judge Jensen's order and to the Union's notice of appeal from that order. Inasmuch as this is not proper procedure and because the Union's notice of appeal has been admitted into evidence as R. Exh. 20, *infra*, I admit into evidence only the order as G.C. Exh. 5(f).

³ Since Respondent inadvertently neglected to assign an exhibit number to the notice of appeal, I have assigned the next in order.

⁴ Still additional collateral litigation between Respondent and SMACNA is apparently ongoing in the state courts of Sonoma County (Tr. 221, 324). The exact issue in and status of that case does not appear in this record.

Any communications concerning this employer should be addressed to our firm, attention the undersigned.

Sincerely,
JORDAN & SMITH
/s/ Mark D. Jordan
[R. Exh. 12.]

April 24, 1989

Sheet Metal & Air Conditioning Contractors
Redwood Empire Chapter
4340 Old Redwood Highway, Suite 108
San Rafael, CA 94903
Attn: Jerry Griffin, Executive Manager
Kathryn A. Sure
Wilie [sic], McBride, Jesinger & Sure
101 Park Center Plaza, Suite 1001
Bank of America Building
Market and Park Avenue
San Jose, CA 95115
Sheet Metal Workers International
Association, Local Union #104
1939 Market Street
San Francisco, CA 94103
RE: BRISCO SHEET METAL
OUR FILE NO. 1016

Dear Ms. Sure & Gentlemen:

Please be advised that our firm continues the function as the authorized representative of Brisco Sheet Metal in all matters pertaining to labor relations.

After sending a letter dated March 27, 1989 wherein Brisco Sheet Metal timely terminated its Collective Bargaining Agreement with Sheet Metal Union Local 104, our firm received a letter from Ms. Sure advising that Mr. Brisco was part of SMACNA and could not bargain as an individual employer.

All parties by this letter our [sic] advised that Mr. Brisco at his last negotiation session was represented by our firm and executed all documents as a single employer, not part of any multi-employer group. During the course of negotiations by the Union's representative Mr. Roger Burk and by letter from the Union's then counsel, it was agreed between all parties that any references to SMACNA were not binding upon Brisco Sheet Metal. As Brisco Sheet Metal did last time, it will discharge its duties as a single employer.

After being advised this [sic] if the Union, or SMACNA, in any way still feels that it represents Brisco Sheet Metal, please advise the undersigned immediately. It is Brisco Sheet Metal's understanding that negotiations have not yet commenced and that neither side has in any way been prejudiced.

Sincerely,
MARK D. JORDAN, ESQ.
[R. Exh. 13.]

May 23, 1989

MR. ROBERT MAMMINI
Business Manager
SHEET METAL WORKERS
Local Union No. 104
1939 Market Street
San Francisco, CA 94103
Re: BRISCO SHEET METAL
Our File No. 1016

Dear Mr. Mammini:

In response to your letter addressed to Brisco Sheet Metal dated May 11, 1989, please be advised of the following.

Our firm continues to function as the authorized representative of Brisco Sheet Metal in all matters pertaining to labor relations. You have previously been advised this [sic] and are again reminded that all communications concerning your Union and Brisco Sheet Metal should be addressed to this firm, attention the undersigned.

In terms of your request that we enter into a voluntary recognition agreement, please be advised that it is Mr. Brisco's desire that the employees be allowed an opportunity to exercise their Section 7 rights in an NLRB election. When you file the appropriate petition with Region 20 of the NLRB, please advise the Board that I am the employer's representative.

Lastly, it is my understanding that while Brisco Sheet Metal still asserts, as all parties have been advised, that it is not represented by the Redwood Empire Chapter of Sheet Metal and Air Conditioning Contractors, it was my understanding that the organization has also advised you that Brisco Sheet Metal will not voluntarily recognize your Union but feels their employees are better protected by having an opportunity to vote in an NLRB secret ballot election.

If you have any questions or wish to discuss this, please do not hesitate to call.

Sincerely,
/s/ Mark D. Jordan/tb
MARK D. JORDAN
[R. Exh. 14.]

Meanwhile, in the summer of 1989, Respondent filed an "RM" petition and on September 8, 1989, the Regional Director for Region 20 issued a Certification of Representative in Case 20-RM-2721, titled "Brisco Sheet Metal, Inc., Employer and Petitioner and Sheet Metal Workers' International Association, Local Union No. 104, Union." In pertinent part, the document reads as follows:

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 104 and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

UNIT: All full-time and regular part-time journeymen, apprentices, pre-apprentices, air conditioning specs, service techs and material expeditors employed by the Employer at its Cotati, California facility; excluding all other employees, guards and supervisors as defined in the Act.

[G.C. Exh. 2.]

As a result of certain information uncovered by the General Counsel's witness David Browning, a business representative for the Union and former employee in the sheet metal trade between 1967 through 1988, Browning filed with Respondent a step one grievance. This document reads as follows:

September 7, 1989
Brisco Sheet Metal
P.O. Box 1626
Rohnert Park, CA 94928
Attn: Dave Brisco

Dear Dave,

This communication serves as notice that SMWIA Local #104 and Brisco Sheet Metal are in Step One (1) of the Grievance Procedure as per Article X, Section One (1) of SFUA (A-3-89).

You are hereby notified that I am agreeable to meet with you to discuss matters of concern so as to reach an amicable settlement in regard to what I believe are violations of contract language as follows:

SFUA (A-3-89) Addendum One, Item 39, Sections C, D, and E

Sincerely,
/s/ Dave Browning
Dave Browning
Business Representative
SMWIA Local 104

[G.C. Exh. 6.]

Generally speaking, Browning believed Respondent to be in violation of pertinent contract language prohibiting "branch shops, or a double-breasted situation," nonbargaining unit employees performing unit work (Tr. 65).⁵

On October 13, 1989, after the step-one grievance did not resolve the issue, Browning requested in writing the services of a Local Joint Adjustment Board, as provided for by the 1986 collective-bargaining agreement (G.C. Exhs. 7(a), (b)). Browning testified, however, that the written request for the Joint Adjustment Board contained certain typographical errors: Wherever SFUA (A-3-86) is typed as a reference to the

applicable collective-bargaining agreement, the correct reference should have been to SFUA (A-3-89), because, according to Browning, as of October 13, 1989, the Union had received an interest arbitration award (Tr. 68). (It is that award which is the subject of collateral litigation in Federal court.)

On or about March 15, Browning sent a letter to Respondent which reads as follows:

SMWIA Local 104 is currently investigating the extent to which union companies in its industry may be operating non-union in violation of the collective bargaining agreement. We are aware of an increasing practice among [sic] Union companies, their officers or other principals to operate non-union companies to perform work that would otherwise be done by Union companies.

These non-union operations erode bargaining units and endanger the financial integrity of fringe benefits funds. They jeopardize the competitiveness of Union companies generally and threaten Union members jobs. These non-union operations violate several provisions in Articles I, II, III, IV, V and Item 39 of Addenda I of SMWIA Local 104's Labor Agreement. Local 104 must determine the necessity for grieving any violations of the Labor Agreements. Local 104 must also determine whether the issue of non-unions should be addressed elsewhere.

It has come to our attention that your company is operating such a non-union company known as American Eagle Fireplaces Company Inc. As part of our investigation of this matter, we are contacting you directly for pertinent information. We require that you supply us with information concerning your company's relationship with the non-union company.

Please respond to the attached questionnaire [sic] directed at the time period of the most recent Labor Agreement July 1, 1989 to June 30, 1992. If you are unable to furnish some of the information requested, please provide all information that you can and state under oath that you cannot furnish the rest.

To determine the appropriateness of a grievance, we require a response within two weeks of the date of this letter.

[G.C. Exh. 8(a).]

Attached to this letter was a 14-page questionnaire which Browning wanted Brisco to answer (G.C. Exh. 8(b)). (This document, alleged at par. 9 of the complaint to call for information which Respondent was required to provide, is attached to this decision as Appendix I.) Instead of answering the questionnaire, Brisco sent a short letter to Browning, which reads as follows:

In as much as Brisco Sheet Metal, Inc. is not presently signatory to SFUA (A-3-89), and as such is not compelled to adhere to requests to honor said agreements, please refrain from communications that refer or allude to such agreement.

If, however, you desire to begin negotiations towards possible acceptance of SFUA (A-3-89), I would be more than pleased to accommodate.

⁵ "Double-breasted" describes a contractor who operates two companies, one unionized and the other open shop. *Watt Electric*, 273 NLRB 655, 657 fn. 11 (1984).

[G.C. Exh. 9.]

Brisco's letter was followed a few days later by a letter from Respondent's attorney, Hugh Helm, to Union Attorney Sure, complaining about direct contacts between the Union and Respondent while the Federal court litigation was ongoing. The letter threatened the Union with a motion for sanctions before Judge Jensen, if any further contact was made without going through Respondent's attorney first (G.C. Exh. 10).

The Union's attorney replied to the above letter on March 29, complaining that Respondent was attempting to impede the Union from representing employees pursuant to the Board's certification and threatening to file unfair labor practices if Respondent did not cease its actions (G.C. Exh. 11).

B. Analysis and Conclusions

1. General principles of applicable law

I begin with the fact that as of September 8, 1989, the Union is the certified collective-bargaining representative of Respondent's employees (G.C. Exh. 2). Because of that status, I find that Respondent generally has an obligation, independent of any collective-bargaining agreement between the parties, to furnish to the Union any requested relevant information which it possesses. *American Standard*, 203 NLRB 1132 (1973); *W-L Molding Co.*, 272 NLRB 1239, 1241 (1984); cf. *Bozzuto's, Inc.*, 275 NLRB 353 (1985).

In *U.S. Abatement*, 303 NLRB 451 (1991), the Board approved the following statement of law taken from *W-L Molding Co.*, supra, 272 NLRB at 1240:

[A] broad discovery-type standard is applicable to requests for information relevant to a union's functions of negotiating and policing compliance with a collective-bargaining agreement. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *General Motors v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983); *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969). "[I]t is not the Board's function in this type case to pass on the merits of the Union's claim that Respondent breached the collective-bargaining agreement or . . . committed an unfair labor practice." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957. "Thus, the Union need not demonstrate actual instances of contractual violations before the employer must supply information." *Boyers Construction Co.*, 267 NLRB 227, 229 (1983). "Nor must the bargaining agent show that the information which triggered its request is accurate, non-hearsay, or even ultimately reliable." *Ibid.* "The Board's only function in such situation is in acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Rockwell-Standard Corp.*, 410 F.2d at 957, quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accord: *General Motors v. NLRB*, 700 F.2d at 1088. [Fn. omitted.]

See also *Parsons Electric Co.*, 304 NLRB 890 (1991).

Still additional guidance is provided by the case of *Postal Service*, 303 NLRB 502 (1991), where the administrative law

judge quoted from *Sheraton Hartford Hotel*, 289 NLRB 463 (1988):

Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant. When the requested information does not pertain to matters related to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

The requested information which Respondent has refused to furnish to the Union in the present case deals with individuals outside of the bargaining unit and therefore the General Counsel has the burden of demonstrating the information's relevance. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enf'd. 763 F.2d 887 (7th Cir. 1985). *Bohemia, Inc.*, 272 NLRB 1128 (1984).

The duty to disclose information concerning nonunit employees will be triggered by a showing that the requesting party has a reasonable basis for requesting the information. *NLRB v. Leonard B. Herbert, Jr. & Co.*, 696 F.2d 1120 (5th Cir. 1983); *Blue Diamond Co.*, 295 NLRB 1007 (1989). What constitutes a reasonable basis for further investigation depends on the particular facts of each case; however, it is clear that a union is not required to assemble a prima facie case. See *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 867-868 (9th Cir. 1977); *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 67 (3d Cir. 1965). To the contrary, a union need garner only sufficient evidence to make its information request "reasonably calculated to lead to the discovery of admissible evidence." *NLRB v. Associated General Contractors of California*, 633 F.2d 766, 771 fn. 6 (9th Cir. 1980). See also *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 433 (1967).

In his testimony, which I found credible, Browning testified that based on certain facts which I will detail below, he believed Respondent was in violation of pertinent contract language prohibiting branch shops, double-breasted situations, nonbargaining unit employees performing bargaining unit work. In *George Koch Sons, Inc.*, 295 NLRB 695 fn. 1 (1989), the Board found that the union had an objective factual basis for believing that the respondent was subcontracting unit work to another company as part of a double-breasted operation and that the respondent violated the Act by failing to provide the union with requested information at all or in a timely manner. See also *Maben Energy Corp.*, 295 NLRB 149 (1989), where the Board found that where a union seeks information to establish an alter ego or single employer relationship, the union is not required to prove the existence of such a relationship. Rather it is sufficient that the General Counsel has established that the union had an objective factual basis for believing that one entity is an "alter ego" or single employer of the other, *Id.*; *Arch of West Virginia, Inc.*, 304 NLRB 1089 (1991)

Finally in *Z-Bro, Inc.*, 300 NLRB 87 (1990), enfd. mem. (8th Cir. 1991), the Board found a violation where two companies, one union and the other nonunion, operated out of the same building, had the same corporate officers and several employees in common. All of this gave rise to a reasonable suspicion that the respondent might be evading the requirements of the collective-bargaining agreement by transferring work to its nonunion affiliate. See also *Walter N. Yoder & Sons*, 754 F.2d 531, 535 (4th Cir. 1985); *Electrical Energy Services*, 288 NLRB 925 (1988), enfd. mem. (10th Cir. 1990).

2. The Union's reasonable basis

I find that through the testimony of Browning, the General Counsel has established that the Union had a reasonable basis for requesting the information in question and for believing that Respondent may have been violating the contract. The evidence presented concerned the relationship between Respondent, a union shop, and American Eagle Fireplace Co., a nonunion shop. Prior to March 15, the date of the questionnaire, the Union became aware that Brisco owned both companies and that American Eagle Fireplace Co. was performing fireplace installation work (Tr. 92). Not only did Brisco own both businesses,—American Eagle Fireplace Co. was co-owned with his wife—but in addition, Brisco owned the properties on which both businesses are now located, and said properties are only 50 yards apart. Finally, Brisco held state contractors' licenses for both companies.

Browning first became aware of American Eagle Fireplace Co. in August 1989. During this time, Browning had received one or more reports from a Respondent bargaining unit employee that a nonbargaining unit employee had been doing bargaining unit work at a certain real estate development. Browning observed the nonbargaining unit employee in question, whom Browning later learned worked for American Eagle Fireplace Co., loading materials onto a truck owned by Respondent. Browning also observed the same individual trimming a fireplace at a real estate development and this was bargaining unit work.

In September 1989, Browning went to Respondent's place of business on an unrelated matter. While there, Browning observed, in plain view, certain work orders for American Eagle Fireplace Co. to perform work at three real estate developments where Respondent had a contract to perform heating, air conditioning, and related work.

In October 1989, Respondent went to an address in Rohnert Park, California, listed for American Eagle Fireplace Co., where he observed in suite 4 metal fireplace chimneys and fireplace boxes. In an adjoining suite, Browning observed heating, ventilation and air conditioning ducts, and a forklift. Because the ducts have nothing to do with the installation of fireplaces, Browning concluded that American Eagle Fireplace Co. was apparently performing bargaining unit work.

In its brief, page 7, Respondent states it "is not arguing whether or not the union had reasonable belief that the employer had violated a collective-bargaining agreement. This is simply because there has been no allegation in the complaint, nor is it the position of the General Counsel, that the issue of the existence of a collective-bargaining agreement needs

to be decided." It is not clear what Respondent means by this statement, or if it is conceding the existence of the Union's reasonable basis for requesting the information in issue. I find, in any event, that the General Counsel has satisfied its burden and the Union's, irrespective of whether Respondent is bound to the current collective-bargaining agreement.

I note that Respondent's additional contention, brief page 7, that the Union's request for information is overbroad, must be rejected. In *Holiday Inn Coliseum*, 303 NLRB 367–368 fn. 6 (1991), the Board stated:

[A]n employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. See, e.g., *A-Plus Roofing*, 295 NLRB 967 (1989) [p. 11 of J.D.] fn. 7.

See also *Keauhou Beach Hotel*, 298 NLRB 702 (1990).

In conclusion, I find that it is unnecessary to cover the questionnaire point by point as I have found the information requested is relevant. *Electrical Energy Services*, supra, 288 NLRB at 922. Respondent's failure to furnish the information in question to the Union violated the Act and I so find.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local Union No. 104 is a labor organization within the meaning of Section 2(5) of the Act.

3. The bargaining unit described below is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time journeymen, apprentices, pre-apprentices, air conditioning specs, service techs and material expeditors employed by the Employer at its Cotati, California facility; excluding all other employees, guards and supervisors as defined in the Act.

4. By failing and refusing to provide the Union with the information requested in the questionnaire contained in Appendix I to this decision, since on or about March 19, Respondent unlawfully refused, and is refusing to bargain in violation of Section 8(a)(5) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

Having found Respondent engaged in an unfair labor practice, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The order will require Respondent to furnish the Union with answers to the questionnaire published in Appendix I to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Brisco Sheet Metal, Inc., Cotati, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Sheet Metal Workers' International Association, Local Union No. 104, by refusing to provide the Union with answers to the questionnaire published in Appendix I to this decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of Sheet Metal Workers' International Association, Local Union No. 104, furnish to it within a reasonable time, the answers to the questionnaire published in Appendix I to this decision.

(b) Post at its facilities at Cotati, California, copies of the attached notice marked "Appendix II."⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX I

QUESTIONNAIRE

1. Describe the type of business in which your company engages.

Describe the type of business in which the non-union company engages.

2. Define the geographic area in which your company does business.

Define the geographic area in which the non-union company does business.

3. State the business address(es) and identify all office locations of your company.

State the business address(es) and identify all office locations of the non-union company.

4. Identify your company's post office box(es) by number and location.

Identify the non-union company's post office box(es) by number and location.

5. Identify your company's business phone number(s) and directory listing(s).

Identify the non-union company's business phone number(s) and directory listing(s).

6. Identify the banking institution, branch location, and account number of your company's bank account(s).

Identify the banking institution, branch location, and account number of the non-union company's bank account(s).

7. Identify the banking institution, branch location, and account number of your company's payroll account(s) not identified above.

Identify the banking institution, branch location, and account number of the non-union company's payroll account(s) not identified above.

8. Identify where and by whom your company's accounting records are kept.

Identify where and by whom the non-union company's accounting records are kept.

9. Identify your company's principal accountant.

Identify the non-union company's principal accountant.

10. Identify where and by whom your company's corporate records are kept.

Identify where and by whom the non-union company's corporation records are kept.

11. Identify where and by whom your company's other business record books are kept.

Identify where and by whom the non-union company's other business record books are kept.

12. Identify your company's principal bookkeeper.

Identify the non-union company's principal bookkeeper.

13. Identify your company's principal payroll preparer.

Identify the non-union company's principal payroll preparer.

14. Identify your company's contractor license number for states where it does construction business.

Identify the non-union company's contractor license number for states where it does construction business.

15. Identify the carrier and policy number for your company's workers compensation insurance.

Identify the carrier and policy number for the non-union company's workers compensation insurance.

16. Identify the carrier and policy number for your company's other health insurance program(s).

Identify the carrier and policy number for the non-union company's other health insurance program(s).

17(a) Identify your company's federal tax payer identification number.

Identify the non-union company's federal tax payer identification number.

(b) Identify where and by whom your company's federal tax returns are kept.

Identify where and by whom the non-union company's federal tax returns are kept.

18(a) Identify your company's other federal or state taxpayer identification numbers.

Identify the non-union company's other federal or state taxpayer identification numbers.

18(b) Identify where and by whom your company's other federal or state tax reports are kept.

Identify where and by whom the non-union company's other federal or state tax reports are kept.

19. Identify amount(s) involved, reason(s) for, and date(s) of transfer of any funds between your company and the non-union company.

20. Identify source(s) and amount(s) of your company's line(s) of credit.

Identify source(s) and amount(s) of the non-union company's line(s) of credit.

21. Identify amount(s) involved and date(s) when your company has operated its capital with a guarantee of performance by the non-union company.

Identify amount(s) involved and date(s) when the non-union company has operated its capital with a guarantee of performance by your company.

22. Identify business(es) to whom your company rents, leases, or otherwise provides office space.

Identify business(es) to whom the non-union company rents, leases, or otherwise provides office space.

23. Identify the calendar period and terms by which your company provides office space to the non-union company, or is provided with office space by the non-union company.

24. Identify your company's building and or office suppliers.

Identify the non-union company's building and or office suppliers.

25. Identify by item(s) purchased, date(s) of purchase, and dollar volume of purchase(s) those building and or office supplies not purchased separately by your company and the non-union company.

26. Identify business(es) that use your company's (a) tools or (b) equipment.

Identify business(es) that use the non-union company's (a) tools or (b) equipment.

27. Identify business(es) to whom your company sells, rents, or leases its (a) operating equipment, (b) office equipment, (c) construction equipment, or (d) tools.

Identify business(es) to whom the non-union company sells, rents, or leases its (a) operating equipment, (b) office equipment, (c) construction equipment, or (d) tools.

28. Identify business(es) from whom your company buys, rents, or leases its equipment.

Identify business(es) from whom the non-union company buys, rents, or leases its equipment.

29. Identify those equipment transactions that your company arranges by written agreement.

Identify those equipment transactions that the non-union company arranges by written agreement.

30. Regarding equipment transactions between your company and the non-union company, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.

31. Regarding equipment transactions between your company and business(es) separate from the non-union company, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.

32. Regarding equipment transactions between the non-union company and business(es) separate from your company, identify the purchase, rental, or lease rate, equipment involved, calendar period, and dollar volume of each transaction.

33. Identify those of the following services that are provided to the non-union company by or at your company.

- (a) administrative
- (b) bookkeeping
- (c) clerical
- (d) detailing
- (e) drafting
- (f) engineering
- (g) estimating
- (h) managerial
- (i) patternmaking
- (j) sketching
- (k) other

34. Identify those of the following services that are provided to your company by or at the non-union company.

- (a) administrative
- (b) bookkeeping
- (c) clerical
- (d) detailing
- (e) drafting
- (f) engineering
- (g) estimating
- (h) managerial
- (i) patternmaking
- (j) sketching
- (k) other

35. Identify where your company advertises for customer business.

Identify where the non-union company advertises for customer business.

36. Identify your company's customers.

Identify the non-union company's customers.

37. Identify customers your company has referred to the non-union company.

Identify customers the non-union company has referred to your company.

38. What customers of the non-union company are now or were formerly customers for your company.

39. Regarding customers identified above as common to your company and the non-union company, state the calendar period and dollar volume of work performed for the customer by your company.

Regarding customers identified above as common to your company and the non-union company, state the calendar period and dollar volume of work performed for the customer by the non-union company.

40. State the dollar volume of business per job performed by your company.

State the dollar volume of business per job performed by the non-union company.

41. Does your company negotiate jobs to obtain work?

Does the non-union company negotiate jobs to obtain work?

42. Does your company bid jobs to obtain work?

Does the non-union company bid jobs to obtain work?

43. Identify those persons who bid and or negotiate your company's work.

Identify those persons who bid and or negotiate the non-union company's work.

44. State the dollar volume minimum and or maximum (if any) as established by law or regulation, that your company may bid on public works projects.

State the dollar volume minimum and or maximum (if any) as established by law or regulations, that the non-union company may bid on public works projects.

45. Identify by customer, calendar period, and dollar volume any job(s) on which your company and the non-union company have bid competitively.

46. Identify by customer, calendar period, and dollar volume any work which your company has subcontracted to, or received by subcontract from the non-union company.

47. Identify subcontract work arranged by written agreement between your company and the non-union company.

48. State the reason for each subcontract let by your company.

State the reason for each subcontract let by the non-union company.

49. Identify by customer, calendar period, and dollar volume any projects on which your company has succeeded, or been succeeded by, the non-union company.

50. Identify work your company performs on the non-union company's products.

Identify work the non-union company performs on your company's products.

51. Identify where your company advertises for employee hires.

Identify where the non-union company advertises for employee hires.

52. Identify by job title or craft position the number of employees employed by your company per pay period.

Identify by job title or craft position the number of employees employed by the non-union company per pay period.

53. Identify the skills that your company's employees possess.

Identify the skills that the non-union company's employees possess.

54. Identify where your company's employees report for work.

Identify where the non-union company's employees report for work.

55. Identify by job title or craft position and respective employment dates those employees of your company who are or have been employees at the non-union company.

56. Identify by job title or craft position and respective employment dates those employees of the non-union company who are or have been employees at your company.

57. Identify by job title or craft position and transfer dates those employees otherwise transferred between your company and the non-union company.

58. Identify projects of each company on which these employees were working at the time of transfer.

59. Identify your company's (a) supervisors, (b) job superintendents, and (c) forepersons or other supervisory persons with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct employees, or to adjust their grievances, or effectively to recommend such action.

Identify the non-union company's (a) supervisors, (b) job superintendents, and (c) forepersons or other supervisory persons with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct employees, or to adjust their grievances, or effectively to recommend such action.

employees, or responsible to direct employees, or to adjust their grievances, or effectively to recommend such action.

60. Regarding those supervisory persons described above as common to your company and the non-union company, identify the period(s) of employment with each company.

61. Identify your company's personnel ever authorized to supervise the non-union company's employees.

Identify the non-union company's personnel ever authorized to supervise your company's employees.

62. Identify by project involved, personnel involved, and date of event, any occasion when your company's personnel performed a supervisory function for the non-union company.

Identify by project involved, personnel involved, and date of event, any occasion when the non-union company's personnel performed a supervisory function for your company.

63. Identify your company's managerial personnel having authority to formulate and effectuate management policies or otherwise able to recommend or to exercise discretionary action within or even independently of established policy.

Identify the non-union company's managerial personnel having authority to formulate and effectuate management policies or otherwise able to recommend or to exercise discretionary action within or even independently of established policy.

64. Identify your company's representatives who have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline supervisory personnel, or responsible to direct supervisory personnel, or to adjust their grievances, or effectively to recommend such action.

Identify the non-union company's representatives who have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline supervisory personnel, or responsible to direct supervisory personnel, or to adjust their grievances, or effectively to recommend such action.

65. Identify your company's representatives otherwise actively involved with day-to-day management or operations.

Identify the non-union company's representatives otherwise actively involved with day-to-day management or operations.

66. Identify by title and respective dates of employment those managerial personnel of your company ever employed by the non-union company.

Identify by title and respective dates of employment those managerial personnel of the non-union company ever employed by your company.

67. Describe your company's compensation program including employee wage rates.

Describe the non-union company's compensation program including employee wage rates.

68. Describe your company's fringe benefits program.

Describe the non-union company's fringe benefits program.

69. Describe your company's labor relations policy.

Describe the non-union company's labor relations policy.

70. Identify your company's representative(s) who establish or otherwise control labor relations policy.

Identify the non-union company's representative(s) who establish or otherwise control labor relations policy.

71. Identify your company's labor relations representative(s).

Identify the non-union company's labor relations representative(s).

72. Identify your company's legal counsel on labor relations matters.

Identify the non-union company's legal counsel on labor relations matters.

73. Identify your company's membership status in the Associated General Contractors.

Identify the non-union company's membership status in the Associated General Contractors.

74. Identify your company's membership status in any other employer association.

Identify the non-union company's membership status in any other employer association.

75. Identify your company's officers.

Identify the non-union company's officers.

76. Identify your company's directors.

Identify the non-union company's directors.

77. Identify place(s) and date(s) of your company's directors meetings.

Identify place(s) and date(s) of the non-union company's directors meetings.

78. Identify your company's owners and or stockholders.

Identify the non-union company's owners and or stockholders.

79. Identify the ownership interest held among your company's owners and or stockholders.

Identify the ownership interest held among the non-union company's owners and or stockholders.

[G.C. 8(b)]